STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN BLACKWELL,

Plaintiff-Appellee,

vs.

DEAN A. FRANCHI and DEBRA FRANCHI

Defendant-Appellants.

Supreme Court No.
COA Case No. 328929
Circuit Court Case No. 14-141562-NI

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

NOTICE OF FILING OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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NOTICE OF FILING OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that Defendant-Appellants, Dean A. Franchi and Debra Franchi, herein file this Application for Leave to Appeal in the above-captioned matter to the Michigan Supreme Court.

Respectfully Submitted,

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Dated: March 6, 2017

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STATEMENT IDENTIFYING JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants Dean and Debra Franchi appeal from the January 31, 2017 decision of the Court of Appeals in this matter. **(Exhibit A)** The Court of Appeals panel, comprised of Judges Kirsten Frank Kelly, Elizabeth Gleicher, and Douglas Shapiro, divided as to whether the Circuit Court's grant of summary disposition was correct. Writing for the Court in a published decision, Judge Shapiro held that a question of material fact existed as to whether a step in a mudroom was open and obvious given the conflicting testimony of the parties and several witnesses. Judge Kelly dissented, arguing that the darkness in the mudroom was itself open and obvious and, therefore, the Franchis had no duty to warn. **(Exhibit B)** Judge Gleicher joined in Judge Shapiro's opinion and wrote a separate concurring opinion to highlight her disagreement with Judge Kelly's dissent. **(Exhibit C)**. The three opinions that the Court of Appeals issued in this case lay bare not only an important legal principle of major significance in Michigan, but also a clearly erroneous application of Michigan law that will result in a material injustice to the Appellants if allowed to stand.

In the nearly two decades since this Court decided *Singerman v. Municipal Service Bureau, Inc.*, 455 Mich. 135 (1997), the question that *Singerman* left unanswered – whether darkness by itself constitutes an open and obvious condition on the land barring recovery in a premises liability action – has split the lower courts in Michigan. Indeed, just two weeks before the Court of Appeals reversed the grant of summary disposition in the present case, another panel of the Court of Appeals reversed a denial of summary disposition on the basis that darkness was an open and obvious condition that could conceal a hazard. See *Basacchi v. Fawzi Simon*, COA No. 329503 (January 17, 2017)(unpublished)(per curiam). Appellants raised a similar issue in both the Circuit Court and in the Court of Appeals, arguing that the lack of light in the mudroom

where the Appellee allegedly fell was itself an open and obvious condition should operate to bar liability. Notwithstanding the fact that this was a primary argument that Appellants brought in the Court of Appeals in defense of their position, the **main opinion does not address it at all**. Rather, the concurring and dissenting opinions were left to debate this question, which has remained open for nearly twenty years since this Court divided evenly on it. Although the question is unresolved in the State of Michigan, courts in several other states have addressed this question and, after due consideration, have adopted the position that darkness by itself is an open and obvious condition that relieves a landowner of liability. In light of the foregoing, there can be little doubt that this case raises a legal principle of major significance in the jurisprudence of the state of Michigan.

Additionally, the decision of the Court of Appeals is clearly erroneous and will result in a material injustice because that court applied the incorrect standard for assessing the duty owed to a licensee. Even if there is a question of fact as to whether there was an open and obvious condition on the Appellants' premises, the Court of Appeals did not address whether Appellants had breached their duty to a licensee on their premises. That duty, as set forth in Restatement of Torts 2nd § 342, was adopted by this Court in *Preston v. Sleziak*, 383 Mich 442, 453 (1970). The Restatement states in relevant part that the duty owed to a licensee exists only if "the possessor knows or has reason to know of the condition and should realize that it involves an **unreasonable** risk of harm to such licensees, and should expect that they will not discover or realize the danger . . . ." Restatement (Second) of Torts § 342 (a) (emphasis added). In undertaking a *de novo* review of the summary disposition motion presented to the trial court, the Court of Appeals had an obligation to address this question. The fact that it did not do so is critical because the Appellee presented no evidence of such an unreasonable risk of harm in its

response to the motion for summary disposition. The Court of Appeals overlooked this critical issue and the result, if allowed to stand, is a material injustice to the Appellants.

For these reasons, set forth in greater detail in this application, this Honorable Court should grant leave for further review and, even if it opts not to entertain the first question, issue a peremptory reversal of the Court of Appeals decision as to the second question.

STATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Trial Court correctly held that a room which was unlit when the Plaintiff entered it of her own volition, constituted an open and obvious condition upon the land, thus warranting the granting of Defendants' motion for summary disposition.

The Trial Court says: Yes

The Court of Appeals says: No Answer

Plaintiff-Appellee says: No

Defendants-Appellants say: Yes

II. Notwithstanding the answer to the prior question, did the Plaintiff fail to present evidence of a genuine issue of material fact as to whether Defendants breached their duty to their social guests to warn of a hidden danger of an unreasonable risk of harm when Plaintiff entered the mudroom immediately before she allegedly fell.

The Trial Court says: Yes

The Court of Appeals says: No

Plaintiff-Appellee says: No

Defendant-Apellants say: Yes

STATEMENT OF FACTS

On December 14, 2013, the Defendants-Appellants, Dean and Debra Franchi, hosted a holiday party in their home. Among the guests at this party was the Plaintiff-Appellee, Susan Blackwell. As will be discussed in greater detail below, the events that transpired that evening do not constitute an actionable premises liability claim. Accordingly, the lower court was correct to grant the Defendants' motion for summary disposition.

The Franchis hosted the holiday party at their home on the evening of December 14, 2013. Although Appellant Debra Franchi and the Appellee were co-workers, this gathering was strictly social; the party was not a workplace-sponsored activity. Of the approximately thirty to forty employees of the University of Michigan Geriatric Clinic where Appellant Debra Franchi and Appellee worked, only two other employees were present at the party: Ebony Whisenant and Jane Brogan.[1]

Appellee arrived at the home with fellow guests, Dave and Jane Brogan.[2] Soon after she arrived at the Franchi home, Appellee started to walk down the hallway toward the rear of the house where the other guests had gathered. Appellee had only been to the Franchi home on one prior occasion.[3] As she made her way to where the other guests were located, Appellee stepped into a mudroom that adjoined the hallway. She had never been in the mudroom previously.[4] Appellee noticed that the mudroom was unlit before she stepped into it.[5] Although the mudroom was not lit, the appropriate light switch was on the wall immediately next to the entrance as Appellee walked into the room.[6] Appellee made no effort to determine whether there was an

[1] Deposition of Susan Blackwell at p. 31-32.
[2] Deposition of Susan Blackwell at p. 31-32
[3] Deposition of Susan Blackwell at p. 45-46.
[4] Deposition of Susan Blackwell at p. 46.
[5] Deposition of Susan Blackwell at p. 52-53.
[6] Reply Brief in support of Defendant's Motion for Summary Disposition at p. 1.

available light switch to light the mudroom.[7] She simply assumed that the mudroom floor surface was flat when she stepped into it.[8] Appellee claims that she did not see an eight-inch step in the mudroom, allegedly causing her to lose her balance, fall, and injure herself.[9]

PROCEDURAL HISTORY

Soon afterward, Appellee filed suit against the Appellants in Oakland County Circuit Court. Her complaint alleged claims for premises liability and public nuisance.[10] After the close of discovery, Defendants filed a motion for summary disposition pursuant to MCR 2.116 (C)(10). The Honorable Colleen O'Brien heard the motion on June 3, 2015. Reading her decision from the bench, Judge O'Brian opined as follows:

> The Court also concludes there is no genuine issue of material fact that plaintiff cannot prevail on her premises liability claim under Count One.
>
> Plaintiff claims she was an invitee rather than a licensee as argued by the Defendant. Yet, even if this Court were to conclude that the plaintiff was an invitee, summary disposition still remains proper. With regard to invitees, a land owner owes a duty to use reasonably care to [protect] invitees from the unreasonable risk of harm posed by a dangerous condition on the owner's land; [*Hoffner v. Lanctoe*, 492 Mich 450, 460 (2012).]
>
> However, a land owner owes no duty to protect or warn against a danger that is open and obvious because such danger by its very nature apprises an invitee of the potential hazard, which the invitee may take reasonable steps to avoid.
>
> Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person, with ordinary intelligence, would have discovered it upon casual inspection. The Court concludes that reasonable minds could not differ that the alleged condition here was open and obvious. Moreover, there are

[7] Deposition of Susan Blackwell at p. 69.
[8] Deposition of Susan Blackwell at p. 54-55.
[9] Deposition of Susan Blackwell at p. 69-70.
[10] Although the Circuit Court dismissed the public nuisance count simultaneously with the premises liability count, the ruling on public nuisance was not appealed.

> no special aspects. Accordingly, Count One is dismissed. Okay, the Court will enter an order.[11]

The Court entered the order granting Defendants' motion for summary disposition. After a failed motion for reconsideration of that decision, Plaintiff's appeal to the Michigan Court of Appeals ensued.

After the parties briefed the issues, the Michigan Court of Appeals (Kelly, Gleicher, and Shapiro, JJ.) heard oral argument in Blackwell's appeal on December 13, 2016. On January 31, 2017, a divided panel issued its published decision in this matter. The Appellants now seek leave for further appeal for the reasons set forth in this application.

[11] Transcript of Motion Hearing at p. 5-6.

LEGAL ARGUMENT

I. Standard of Review

A trial court's ruling on a motion for summary disposition is reviewed *de novo*. *Epps v. 4 Quarters Restoration, LLC*, 498 Mich 518, 528 (Sept. 28, 2015)(citing *Costa v. Community Emergency Med. Servs., Inc.*, 475 Mich 403, 416 (2006)). Summary disposition is appropriate where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116 (C)(10). In deciding the motion, the trial court must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v. Rozwood*, 461 Mich. 109, 121 (1999). Summary disposition may be granted if there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *West v. Gen. Motors Corp.*, 469 Mich. 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

II. The Court of Appeals erred when it reversed the Circuit Court's grant of summary disposition because no evidence was presented in the Circuit Court that the Franchis violated any legal duty.

In this case, Judge O'Brien correctly granted the motion for summary disposition because the Appellee offered no evidence to counter the proposition that the unlit and unfamiliar mudroom was anything other than an open and obvious condition on the land. Accordingly, no evidence was offered upon which the Court of Appeals could have reached a contrary conclusion. This Honorable Court should reverse the decision of the Court of Appeals.

A. Regardless of Appellee's status on the property, the alleged condition was open and obvious, thus barring her premises liability claims.

No matter whether Appellee was a licensee or an invitee, the fact that her injury allegedly resulted from a condition on the premises that was open and obvious bars her claim. Further, Appellant's failure to raise the existence of any "special aspects" of such an open and obvious condition bars this Court's consideration of them on appeal. However, even if this Court were to look for such "special aspects," it would find none. Where a party is allegedly injured by a condition on the property after willingly walking into an unlit, unfamiliar room, there can be no recovery because common sense dictates that any hazard within is dangerous because of the lack of available light.

1. The Circuit Court correctly applied the objective "open and obvious" standard in granting summary disposition.

A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v. Coggins Mem. Christian Methodist Episcopal Church*, 210 Mich App 261, 264 (1995). Under the open and obvious doctrine, where a licensee knows of the danger or where it is so obvious that a reasonable licensee should discover it, a premises owner owes no duty to warn of the condition unless harm should be anticipated despite the licensee's awareness of the condition. *See Riddle v. McLouth Steel Products Corp.*, 440 Mich 85, 96 (1992)(explaining rule in context of invitee Plaintiff). Irrespective of whether the open and obvious condition is the allegedly inadequate lighting in the Appellants' mudroom or the single step contained within it, there can be no liability on the facts of this case. The Circuit Court correctly applied this rule when it granted Defendants' motion for summary disposition.

a. The evident darkness of the mudroom as the Appellee entered it was an open and obvious condition that absolves Appellants of liability.

For twenty years, Michigan law has been unclear on the question whether a condition of darkness can be an open and obvious condition. This Court split evenly on the question in *Singerman v. Municipal Service Bureau*, 455 Mich 135 (1997). In that case, Justice Weaver wrote:

> The Court of Appeals incorrectly held that defendants owed a duty to plaintiff because the harm was foreseeable, despite the open and obvious nature of the [poor lighting]. The question is not the foreseeability of the harm. Rather the question for the courts to decide is whether the risk of harm remains unreasonable, despite its obviousness or despite the [licensee's] knowledge of the danger. If the court finds the risk is still unreasonable, then the court will consider whether the circumstances are such that the [licensor] is required to undertake reasonable precautions. If so, then the issue becomes the standard of care and is for the jury to decide.

Id. at 142-143. In that case, the lower court found that the poor lighting was an "unusual aspect" that rendered the risk unreasonable. Justice Weaver rejected this reasoning:

> However, there was nothing unusual about the inadequate lighting in the hockey rink to cause such a duty to remain. Plaintiff was an adult and an experienced hockey player. **The lighting in the rink is alleged to have been consistently inadequate, not subject to unexpected fluctuations or other changes. There was nothing to prevent plaintiff from realizing the rink was inadequately lighted.** Nor was there any chance he would forget the potentially hazardous condition, because the condition was consistently before him. Finally, Plaintiff was not compelled to use the rink for work, or profit, or any other overriding or substantial motivation. He chose to participate in a dangerous sport **under conditions that he knew to be dangerous**.

Id. at 144 (emphasis added); *also see, Benton v. Watson*, 121 N.E. 399, 400 (Mass. 1919)("The plaintiff knew and appreciated the measure and degree of darkness, he was not misled by any act of the defendant, and he knew, as all men of ordinary experience must know, that one who walks in the total darkness of a strange hall is likely to encounter obstructions to his passage and

pitfalls to his feet.")(emphasis added). Because the *Singerman* Court split evenly on this question, this is the only section of Justice Weaver's opinion that did not enjoy the concurrence of the full Court.

Although the relationship between darkness and hazardous conditions has been examined by the Court of Appeals on several occasions, see *Abke v. Vandenburg*, 239 Mich App 359 (2000); *Knight v. Gulf & Western Properties*, 196 Mich App 119 (1992), these cases are distinguishable from the case at bar. In *Knight*, the plaintiff was a real estate agent working on behalf of potential buyers of a warehouse. After showing the property, he returned to the warehouse to turn out the lights and secure the building. Soon after entering the building, Knight fell from a loading dock. The Court of Appeals in that case held that the loading dock was not an open and obvious condition. Specifically:

> Certainly, there was no need to warn plaintiff of the dark. However, there was no evidence that plaintiff could intelligently choose not to encounter the hidden risk posed by the recessed loading dock. [. . .] Plaintiff was told that there were loading docks, and the exterior docks were open and obvious, but the specific location of one of the docks in the interior of the warehouse was not disclosed and plaintiff had no reason to know or expect that there were interior docks without a warning from defendant.

Id. at 127-128. Unlike *Knight*, this case concerns a plaintiff who was not an invitee but rather a licensee; therefore, whereas the premises owner had a duty to protect Knight from dangerous conditions, here the only duty owed was to warn of hidden dangers of an unreasonable risk of harm.

In *Abke v. Vandenberg*, the plaintiff met the defendant at a supply barn to purchase hay. Defendant led plaintiff toward the hay storage area. After they walked down a hallway, defendant led plaintiff through a sliding door. After closing the sliding door, plaintiff turned and

fell off of a loading dock into a truck bay. He injured himself in this fall. 239 Mich App at 360. "Plaintiff testified that the loading dock area in which he fell was dark and that he could only see defendant's silhouette as defendant walked away from him just before the accident." *Id.* at 362. In *Abke*, the defendant actually led plaintiff into the darkness, which was not readily apparent before plaintiff walked through the sliding door. The present case is readily distinguishable, however, in two respects. First, the Franchis did not lead Appellee into a poorly lit room, but rather she entered it on her own. Second, and more to the point, Appellee was able to see that the mudroom was dark before she entered it. The darkness constitutes the open and obvious condition that should bar liability as against the Appellants.

More recently, a panel of the Michigan Court of Appeals endorsed the proposition that darkness can be an open and obvious condition on the land. Indeed, just two weeks before the Court of Appeals ruled in this case, another panel issued an unpublished opinion in *Basacchi v. Fawzi Simon*, COA No. 329503 (January 17, 2017)(unpublished)(per curiam). Although that decision has no precedential value unless the court grants a request by one of the parties to publish it, it is nevertheless indicative of the openness in Michigan courts to recognize that a licensee can encounter darkness on certain premises, understand that the darkness might contain unseen hazards, and therefore be aware of the risk of proceeding into the darkness. This court should look to that case for its persuasive value as it reviews this case.

b. <u>The courts of other states have found that inadequate lighting constitutes an open and obvious condition for the purposes of premises liability.</u>

The courts of several other states have examined this issue. Overwhelmingly, the appellate courts in other states that have addressed this issue have concurred that darkness by itself is an open and obvious condition. This Honorable Court should do the same.

In *GMC v. Hill*, 752 So. 2d 1186 (Ala. 1999)(per curiam), the Supreme Court of Alabama reversed a plaintiff's judgment in a premises liability action, writing that "Total darkness, possibly concealing an unseen an unknown hazard, presents an open and obvious danger to someone proceeding through unfamiliar surroundings, as a matter of law." *Id.* (quoting *Ex parte Industrial Distribution Servs. Warehouse, Inc.*, 709 So. 2d 16, 19 (Ala. 1997)). Part of the Court's analysis rested on the fact that "If the area was so dark that Mr. Hill could not such a large trailer in his path, **then the darkness itself presented a danger that was open and obvious**." *Id.* at 1188 (emphasis added).

A panel of the Wisconsin Court of Appeals has acknowledged that darkness is a natural condition on land that was open and obvious to the plaintiff. *Lara v. Leslie Knutsen Post VFW No. 2304*, 501 N.W. 2d 470 (1993)(unpublished per curiam decision). Similarly, appellate courts in the State of Ohio have endorsed a similar view. "Darkness is always a warning of danger, and for one's own protection it may not be disregarded." *Cash v. Thomas & King Ltd. Liability Co.*, 2016-Ohio-175, P27 (Ohio App. 2016)(quoting *Jeswald v. Hutt*, 15 Ohio St. 2d 224, 229 (1968)).

In the present case, the Appellee's protests that the mudroom was inadequately lit are unavailing for her premises liability action. Darkness that is readily discernable can always contain hazards; this is precisely why the courts of other states had have found that such darkness is an open and obvious condition that operates to bar defendant's liability. Under this framework, there can be no recovery against the Defendant-Appellants. This Court should adopt the reasoning of these courts from other states concerning the open and obvious nature of darkness.

c. The courts of Michigan have consistently recognized that the danger of falling from steps and differing floor levels is an open and obvious one.

The danger of tripping and falling from steps and differing floor levels is generally an open and obvious one, and injuries from such conditions are generally not actionable absent aspects of the condition that make the risk of harm unreasonable. *Bertrand v. Alan Ford, Inc.* 449 Mich 606, 614 (1995). "[B]ecause steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps 'foolproof.' Therefore, the risk of harm is not unreasonable." *Id.* at 616-617. When analyzing the risk of harm, it is also appropriate to consider whether an alternate route was readily available to the plaintiff. *Corey v. Davenport College of Business*, 251 Mich App 1, 9 (2002).

Moreover, any hazard created by a single step in the mudroom was open and obvious because the lighting in and near the mudroom was at least adequate to show the presence of a step if one were casually inspecting the floor of an unfamiliar room. There is no question that a person of reasonable intelligence in an unfamiliar room in a residential house would take appropriate care for her own safety before wandering into an unlit and unfamiliar room. Appellant, by her own admission, failed to do his. Her failure to take this simple, obvious action bars any potential recovery.

d. The Court of Appeals misapplied the holding of *Bertrand v. Alan Ford, Inc.* to the facts of this case, resulting in reversible error.

The Court of Appeals' reliance on language from *Bertrand v. Alan Ford, Inc.* to find that conflicting testimony about a step's visibility may defeat a determination that a condition is open

and obvious is erroneous because it reads half of the rule out of existence and converts an objective standard to a subjective one. That is, it is not enough to look at a step and determine whether there is conflicting testimony about its visibility in order to establish a defendant's legal duty for the purpose of a dispositive motion. Rather, the *Bertrand* Court set forth the standard in greater detail:

> With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be special aspects of these particular steps that make the risk of harm unreasonable, and accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe.

449 Mich at 611 (italics in original, underlining added). In other words, "where there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Id.*at 617 (quoting *Garret v. W.S. Butterfield Theatres*, 261 Mich 262, 263-264 (1933)). Thus, when a single step is at issue, the Court should look at the special aspects as a whole in determining whether the defendant has a duty of reasonable care to plaintiff.

The danger of conflating the general rule that steps are open and obvious with the analysis for exceptions due to special aspects was recognized by at least one justice when this Court ruled in *Bertrand*. Justice Weaver observed that cases finding an unreasonable risk of harm despite the obviousness of the condition "are rare and typically involve hazardous natural conditions such as accumulations of snow and ice or excessive mud." *Id.* at 625 (Weaver, J., concurring in part and dissenting in part). In those instances, the risk to the invitee was found to

be "more unavoidable than other conditions, thus creating an exception to the open and obvious defense." *Id.*at 625-626 (Weaver, J., concurring in part and dissenting in part).. She then warned that this exception, when applied improperly, "threatens to swallow the open and obvious defense and render summary disposition impossible." *Id.* at 626 (Weaver, J., concurring in part and dissenting in part)..

The rule set forth by the Court of Appeals below does exactly that. When the question becomes about not a single step in a residential home, but rather the circumstances surrounding that step, and as here, the step was in an out of the way location that plaintiff entered without any regard for her own safety, then as a practical matter the open and obvious defense becomes inaccessible for homeowners who are sued by their licensees – their social guests – who are charged with taking reasonable care for their own safety. This Court should not allow that rule to stand.

2. Appellant identified no "special aspect" which would have worked to defeat the "open and obvious" determination.

Appellant's failure to identify any "special aspect" that would permit her to recover for injuries suffered as a result of an open and obvious condition on the Franchis' premises precludes any consideration of this issue. However, even if such consideration is not barred, there are no special aspects at issue in this case. The open and obvious condition on the property remains a bar to any recovery.

The 'special aspects' exception to the open and obvious doctrine is a limited exception for hazards that are effectively unavoidable. *Hoffner v, Lanctoe*, 492 Mich 450, 468 (2012). "Unavoidability is characterized by an *inability to be avoided*, and *inescapable* result, or the *inevitability* of a given outcome." *Id.* (emphasis in original). Further, where a person has a

choice whether to confront the hazard, such a hazard by definition "cannot be truly unavoidable, or even effectively so." *Id.* at 469.

In this case, there is no evidence that Appellee was confronted with such a dilemma. At any time, she could have opted not to place her purse in an unfamiliar, unlit room and simply continued on to the party. Nothing compelled her to enter the mudroom. Consequently, there is no basis for the application of the "special aspects" exception to the open and obvious doctrine.

B. Appellee was a licensee on Appellants' property and, therefore, the only duty owed to her was to warn her of hidden dangers of an unreasonable risk of harm.

Appellee incorrectly describes herself in the Complaint as an "invitee" on the Franchis' property. Appellee does not enjoy the status of an invitee, however, because she was a social guest in the Franchi home at the time of the incident giving rise to this action. Rather, Appellee is a licensee who was on the property with the Franchis' consent during their holiday party.

1. The Appellants were only obliged to warn Appellee of hidden dangers on their property.

Michigan law draws a bright line between licensees and invitees. The duty that a landowner owes to a person on his property depends upon whether the visitor is an invitee, a licensee, or a trespasser. *Sanders v. Perfecting Church*, 303 Mich App 1, 4 (2013)(citing *Hoffner v, Lanctoe*, 492 Mich 450, 460 n. 8 (2012)). "A 'licensee' is a person who is privileged to enter the land by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit." *Stitt v. Holland Abundant Life Fellowship*, 462 Mich 591, 596-597 (2000)(emphasis added).

A higher duty of care is owed to an invitee than to a licensee. An invitee is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding, that reasonable care has been used to prepare the premises, and make it safe for the invitee's reception. *See id.* "In *Stitt*, our Supreme Court held that a plaintiff will be granted invitee status only if the purpose for which she was invited onto the owner's property was 'directly tied to the owner's commercial business interests.'" *Sanders*, 303 Mich App at 5 (quoting *Stitt*, 662 Mich at 603-604).

There is no genuine dispute in this action that Appellee was on the Franchis' property as a social guest and that she was not present for any commercial business purpose. "In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose." *Stitt*, 462 Mich at 604. Consequently, Appellee's status is that of a licensee and the Franchis' duty of care corresponds to that status.

With regard to licensees, no liability arises if the licensee knows or has reason to know of the danger, or if the landowner should expect that the licensee will discover the danger. *Wymer v. Holmes*, 429 Mich. 66, 71 (1987). Moreover, a dark room, viewed from the outside, is not a "hidden danger." A single step, when the Appellant herself can take measures to light it, is not a "hidden danger." In this case, there was no reason to believe that Appellant would encounter <u>any</u> hidden danger. Moreover, Appellee made no effort to use the light switch that was immediately next to the entrance to the mudroom, a common sense act for anyone entering an unlit and unfamiliar room. This would have been the first step in discovering any potentially hazardous condition in a darkened room. Regardless, Appellee has failed to meet her burden of proof that Defendants had a duty to warn her of conditions could not reasonably find on her own.

2. Appellee failed to present evidence of a genuine issue of material fact that the step in the mudroom posed an unreasonable risk of danger.

It is finally worth noting that Appellee failed to identify any evidence that the single mudroom step posed an unreasonable risk of danger, although this is the second half of the duty of care that is owed to a licensee. The Appellee cannot now come before this Court and make any claim that summary disposition was improper on that basis. If nothing else, the lack of evidence presented by Appellee to attack this other piece of the legal duty that the Franchis owed to her is enough to warrant reversal of the Court of Appeals. This Court should do so.

RELIEF REQUESTED

For the foregoing reasons, the Defendant-Appellants, Dean Franchi and Debra Franchi, respectfully request that this Honorable Court grant this application for leave to appeal and, if the Court is disinclined to grant leave as to the first question, grant peremptory reversal as to the second question presented.

Respectfully Submitted,

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EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

SUSAN BLACKWELL,

Plaintiff-Appellant,

v

DEAN FRANCHI and DEBRA FRANCHI,

Defendants-Appellees.

FOR PUBLICATION
January 31, 2017
9:00 a.m.

No. 328929
Oakland Circuit Court
LC No. 14-141562-NI

Before: K. F. KELLY, P.J., and GLEICHER and SHAPIRO, JJ.

SHAPIRO, J.

Plaintiff appeals as of right the order of the trial court granting defendants' motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in this premises liability case. On the evening of December 14, 2013, plaintiff attended a dinner party at defendants' home. Defendants' home includes a hallway that leads from the front door to the living room and dining room area. There are two rooms on each side of the hallway, a bathroom and a mud room. There is an approximately eight inch drop-off as one steps into the mud room from the hallway. Plaintiff went to put her purse in the mud room, after arriving at defendants' home, and fell upon entry as a result of the drop-off. Plaintiff was injured and filed suit. Defendants moved for summary disposition arguing that the drop-off was open and obvious, and, therefore, they had no duty to warn plaintiff of its existence. The trial court granted defendants' motion. We reverse.[1]

The open and obvious doctrine provides that "if the particular activity or condition creates a risk of harm *only* because the invitee [or licensee] does not discover the condition or realize its danger" then liability is cut off "if the invitee [or licensee] should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d

[1] In addition to premises liability, plaintiff's complaint contained allegations sounding in ordinary negligence and nuisance. The trial court granted summary disposition to defendants on these claims as well. The parties do not present any substantial argument on ordinary negligence or nuisance on appeal, and we affirm the trial court's grant of summary disposition on these claims.

185 (1995).[2] As a general rule a drop-off, like a step, does not in and of itself create a risk of harm since if seen a reasonable person can readily transverse it without incident.[3] In this case, however, plaintiff argues that the danger from the drop-off arose "because [plaintiff] d[id] not discover the condition or realize its danger." *Id.* Thus, the question is whether "[plaintiff] *should have* discovered the condition and realized its danger." *Id.* (emphasis added).

Whether plaintiff should have discovered the drop-off, turns on whether "an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 578-577; 844 NW2d 178 (2014) (quotations and citation omitted). If so, the condition is open and obvious, and no duty to warn arises. A defendant is entitled to summary disposition on the basis of the open and obvious doctrine "[i]f the plaintiff alleges that the defendant failed to warn of the danger, yet no reasonable juror would find that the danger was not open and obvious." *Bertrand*, 449 Mich at 617. In order for a plaintiff's claim to survive a defendant's motion for summary disposition on open and obvious grounds, the plaintiff must "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence of [the condition.]" *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Therefore, we must determine whether, based on the evidence presented, there is a genuine factual dispute regarding whether an average user of ordinary intelligence acting under

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[2] Plaintiff argues that she should properly be considered an invitee because the dinner party at defendants' house was a work-related party. However, the evidence does not support this conclusion. Plaintiff did work at the University of Michigan with defendant Debra Franchi, but both testified at their depositions that only two other University of Michigan employees attended the party, and defendant Dean Franchi testified at his deposition that 50-60 people had been invited to the party and that about 20-25 people attended. Additionally, during plaintiff's deposition, she distinguished defendants' party from her employer's holiday party. This evidence shows that plaintiff is properly classified as a licensee at the time of her injury. A premises possessor does not owe a duty to a licensee to make the premises safe, but does owe a duty "to warn the licensee of hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

[3] While "the danger of tripping and falling on a step is generally open and obvious[,] . . . where there is something unusual about the steps because of their character, location, or surrounding conditions, then the duty of the possessor of land to exercise reasonable care remains." *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18; 643 NW2d 212 (2002) (quotations omitted). See also, *Bertrand* at 624 (though no duty to warn because step was open and obvious, a question of fact existed whether the step itself, given its location and traffic, created an unreasonable risk of harm).

the conditions as they existed at the time plaintiff encountered the drop-off would have been able to discover it on casual inspection. See *id.*

Plaintiff presented evidence in the form of deposition testimony from several other party guests establishing that the drop-off into the mud room was not discoverable upon casual inspection at the time she encountered it. Guest Endia Simmons testified that she was walking with plaintiff when plaintiff fell. Simmons testified, "[W]e didn't realize that there was a step down because there [were] no lights in that particular room." Simmons further testified that "you could not see that there was a level down" and stated that "[i]t just looked like it was straight across." Simmons also stated that had she been walking ahead of plaintiff she likely would have fallen. Guest Ebony Whisenant, while acknowledging that she did not specifically see plaintiff fall, corroborated Simmons's description of the mud room entrance testifying at her deposition that the hallway into the mud room looked level and that the height differential could not be seen. Whisenant described the mud room as "very dark." Additionally, while the deposition testimony of the guests was not unanimous as to the lighting condition of the hallway adjacent to the mud room, everyone, including defendant Dean Franchi, was in agreement that the light inside the mud room was turned off at the time of plaintiff's fall. The photographs submitted by the parties also demonstrate that the drop-off is not easily seen, even with sufficient lighting. The testimony and photographs clearly demonstrate a question of fact of whether an average user acting under the conditions existing when plaintiff approached the mudroom would have been able to discover the drop-off upon casual inspection.[4]

This case is distinguishable from *Novotney*, where we determined that summary disposition was appropriate. In that case, plaintiff did not assert that the handicap ramp could not be seen by an average person; she alleged only that she didn't notice it even though it was daytime. In the case now before us, plaintiff asserts that given the absence of lighting, the drop-off could not be seen by an average person and presents evidence through the testimony of third parties and photographs to support that assertion.

Defendants also argue that the drop off or height differential was open and obvious because plaintiff could have turned on a light switch that was located at the entry to the mudroom that would have illuminated the mud room. However, this is not a duty question but is instead a question of comparative negligence. See *Lamp v Reynolds*, 249 Mich App 591, 599-600; 645 NW2d 311 (2002). The open and obvious doctrine focuses on the condition of the premises and the hazard as they existed at the time the plaintiff encountered them. See *Novotney*, 198 Mich App 475. There is no additional requirement that the plaintiff take reasonable steps to improve the visibility of the alleged hazard. Defendants' argument that plaintiff should have discovered and turned on the light switch is not merely a statement that plaintiff should have looked where she was going but is a statement that she should have altered the premises' condition by turning on the lights.

[4] Susan Blackwell and plaintiff testified that they were directed by Debra Franchi to put their purses in the mud room. Debra Franchi testified that they went in on their own initiative.

Because the determination of whether defendants' owed plaintiff a duty to warn of the drop-off will depend on how the conflicting testimony regarding whether the drop-off was open and obvious is resolved, the conflicting testimony must be submitted to the jury, and the trial court's grant of summary disposition to defendant was erroneous. See *Bertrand*, at 449 Mich at 617.

Reversed and remanded. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

SUSAN BLACKWELL,

Plaintiff-Appellant,

v

DEAN FRANCHI and DEBRA FRANCHI,

Defendant-Appellee.

FOR PUBLICATION
January 31, 2017

No. 328929
Oakland Circuit Court
LC No. 14-141562-NI

Before: K. F. KELLY, P.J., and GLEICHER and SHAPIRO, JJ.

K. F. KELLY (*dissenting*).

I respectfully dissent. The relevant inquiry is not whether the *step* was open and obvious, but whether the *dark room* was open and obvious.

I agree with the majority that plaintiff was a licensee for whom defendants had an obligation to warn of hidden dangers. At the heart of this matter is what constituted the "danger" to plaintiff – the unexceptional 8-inch step or the dark room? At oral argument, plaintiff's attorney conceded that there was absolutely nothing remarkable about the step. Counsel specifically acknowledged that it was a normal 8-inch step that, had the room been properly lit, would have been open and obvious. Plaintiff claims that the step was a danger because it was "unknown." However, it was unknown because plaintiff purposefully entered a dark room to confront unidentified dangers. The danger was not the stairs, but the dark room itself, which could have contained a variety of other unspecified and common-place "dangers," such as laundry baskets or toys. The fact that the room was not lit was open and obvious. Plaintiff should have realized the danger entering a dark and unknown room posed. I would affirm summary disposition in defendants' favor.

/s/ Kirsten Frank Kelly

EXHIBIT C

STATE OF MICHIGAN

COURT OF APPEALS

SUSAN BLACKWELL,

Plaintiff-Appellant,

v

DEAN FRANCHI and DEBRA FRANCHI,

Defendants-Appellees.

FOR PUBLICATION
January 31, 2017

No. 328929
Oakland Circuit Court
LC No. 14-141562-NI

Before: K. F. KELLY, P.J., and GLEICHER and SHAPIRO, JJ.

GLEICHER, J. (*concurring*).

I fully concur with the analysis advanced in the majority opinion, and write separately only to respond to the dissent.

According to the dissent, "[t]he relevant inquiry is not whether the *step* was open and obvious, but whether the *dark room* was open and obvious." (Emphasis in original.) Respectfully, this is an inaccurate statement of the law. The danger on defendant's land was a step shrouded in darkness. The readily apparent darkness of the coat room would have presented no danger had the step not been there.

In large part, Michigan's law of premises liability focuses on whether a particular property owner owes a duty of care to a third party. In cases involving licensees such as plaintiff Susan Blackwell, defendants have a duty to warn of any hidden dangers known to them. *Stitt v Holland Abundant Life*, 462 Mich 591, 596; 614 NW2d 88 (2000). The "dangers" that are the subjects of premises liability law are conditions of the *land*. In the seminal case of *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), our Supreme Court plainly enunciated that the duty of a premises possessor relates to risks of harm "caused by a dangerous condition on the land." The "dangerous condition of the land" involved here is an eight-inch drop-off that could not be seen on casual inspection by an ordinary user of the premises.

In *Abke v Vandenberg*, 239 Mich App 359, 363-364; 608 NW2d 73 (2000), this Court recognized that darkness may impair a plaintiff's visibility to the extent that an otherwise observable danger no longer qualifies as open and obvious. The plaintiff in *Abke* fell from a loading dock into a truck bay. *Id*. at 360. He claimed that the drop-off into the truck area was not discernable due to darkness. We held that the trial court properly denied the defendant's motion for summary disposition, as a factual dispute existed "concerning the visibility of the truck bay." *Id*. at 362. See also *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 127;

492 NW2d 761 (1992) ("The fact that defendant's vacant warehouse was not adequately lighted was both obvious and known to plaintiff, but there was no evidence that he was aware or had reason to anticipate that there were interior loading docks that otherwise were not marked or blocked off."). These cases, like this one, involve elevation differentials hidden by poor lighting. In neither of our previous cases was darkness the danger—after all, darkness is not necessarily dangerous. The danger presented in our previous cases, and here, was an unseen and unseeable step—a condition of the land.

Record evidence supports that plaintiff was directed to place her coat in a completely dark room preceded by a step that was unexpected and invisible on casual inspection. The legal question presented by defendants' motion for summary disposition is whether a reasonable person in plaintiff's position would have foreseen the danger posed by the concealed step. *Laier v Kitchen*, 266 Mich App 482, 498; 702 NW2d 199 (2005). It bears emphasis that this test is objective. *Id*. It hinges on whether the dangerous condition on the land would have been visible to an ordinary person. We must look to whether a reasonable person in plaintiff's position would have foreseen a danger. *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1998). As the majority opinion aptly describes, a question of fact exists regarding this question. Viewed in the light most favorable to plaintiff, a reasonable jury could conclude that defendants should have anticipated that a first-time guest in their home would not be able to see the darkness-enveloped step, and that a warning was required.

The dissent commits a second legal error by placing on plaintiff the duty to discover any dangers hidden within the dark room before entering it. *Lugo* teaches that "[t]he level of care used by a particular plaintiff is irrelevant to whether the condition created or allowed to continue by a premises possessor is unreasonably dangerous." *Lugo*, 464 Mich at 522 n 5. "In a situation where a plaintiff was injured as a result of a risk that was truly outside the open and obvious doctrine and that posed an unreasonable risk of harm, the fact that the plaintiff was also negligent would not bar a cause of action." *Id*. at 523. See also MCL 600.2958. Absent any warning, plaintiff had no reason to expect a step, and the record hints of no clues that should have raised a suspicion of a significant elevation differential before continuing ahead. Accordingly, I fully concur with the majority's conclusion that reversal of summary disposition is warranted.

/s/ Elizabeth L. Gleicher